Filed 5/15/19 County of Ventura v. Best Choice Bail Bonds CA2/6

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

| | |
|---|---|
| COUNTY OF VENTURA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>BEST CHOICE BAIL BONDS,<br><br>Defendant and Appellant. | 2d Civil No. B291037<br>(Super. Ct. No. 56-2018-00507896-CU-EN-VTA)<br>(Ventura County) |

A bail bond surety appeals summary judgment following denial of its motion to exonerate the bond. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Hovhannes Farmanyan was arrested on nine counts of lewd acts on a child. (Pen. Code,[1] § 288, subd. (c)(1).) On April 29, 2016, he was released on bail under a bond issued by Best Choice Bail Bonds (Best Choice). Farmanyan failed to appear on July 7, 2016, and the court ordered bail forfeited.

[1] All further statutory references are to the Penal Code.

Notice of the forfeiture was mailed on July 11, 2016. Best Choice had 185 days from that date to produce Farmanyan. (§ 1305.)

On January 6, 2017, Best Choice filed a motion to extend the appearance period. The motion was granted, and the appearance period was extended to July 6, 2017.

On July 6, 2017, Best Choice filed a motion to vacate the forfeiture and exonerate the bond. The motion was based on section 1305, subdivision (g). That subdivision requires the surety to show the "defendant is not in custody and is beyond the jurisdiction of the state, is temporarily detained, by the bail agent, in the presence of a local law enforcement officer of the jurisdiction in which the defendant is located, and is positively identified by that law enforcement officer as the wanted defendant in an affidavit signed under penalty of perjury, and the prosecuting agency elects not to seek extradition after being informed of the location of the defendant." (§ 1305, subd. (g).) A declaration in support of the motion by a Best Choice employee stated that she located Farmanyan in Tijuana, Mexico, but she was unable to persuade him to return to the United States or detain him.

A hearing on the motion was set for August 4, 2017, but Best Choice failed to serve Ventura County (the County). The hearing was continued to September 17, 2017, at Best Choice's request. The hearing was continued again to October 16, 2017, at Best Choice's request. On October 16, 2017, the parties stipulated that Best Choice would have an additional two months in which to find Farmanyan. The next hearing was set for January 11, 2018. The matter was continued to February 8, 2018, at Best Choice's request.

On February 2, 2018, the County filed a response to

Best Choice's motion. In response, Best Choice filed another motion to vacate the forfeiture on February 5, 2018.

The motion was supported by a declaration by a Best Choice employee. She declared that she met with Farmanyan in Tijuana, Mexico on January 25, 2018. She convinced him to go with her to a police station in Tijuana to be identified. She presented a California arrest warrant with a booking photograph to a police officer. The police officer verified Farmanyan's identity and stated in an affidavit that Farmanyan was temporarily detained by the Best Choice employee. Farmanyan was taken before a judge in Tijuana. The judge could not find a warrant from Ventura County in his records. Having no basis in Mexico for holding Farmanyan, the police allowed him to leave.

The County opposed the motion on the ground, among others, that Best Choice failed to produce evidence showing the prosecuting agency elected not to seek extradition after being informed of Farmanyan's location. In fact, a deputy district attorney affirmatively stated at the hearing, "[T]his is a case that the People are choosing to extradite."

The trial court denied Best Choice's motion to exonerate the bond on February 8, 2018. In denying the motion the trial court stated: "I'm not criticizing any of the efforts that were made in this case. It does appear that they were not timely. The statutes have run and the request to exonerate the bond is denied."

On February 13, 2018, the trial court entered summary judgment against Best Choice. Best Choice made a motion to set aside summary judgment on the ground that the trial court had no jurisdiction to enter the summary judgment. The trial court denied the motion.

## DISCUSSION

Best Choice contends the trial court lost jurisdiction to enter summary judgment against it.

When a person for whom a bail bond has been posted fails to appear as required without sufficient excuse, the trial court must declare forfeiture of the bond. (§ 1305, subd. (a).) A period of 185 days after the clerk mails notice of forfeiture (180 days plus five days for mailing) is known as the appearance period. (*People v. Financial Casualty & Surety, Inc.* (2016) 2 Cal.5th 35, 42.) During this time the surety on the bond is entitled to move to have the forfeiture vacated and the bond exonerated by an appearance of the accused in court or on other statutory grounds. (*Ibid.*) The trial court may extend the appearance period by an additional 180 days. (*Ibid.*; § 1305.4.) A motion filed in a timely manner may be heard within 30 days of the appearance period, and the court may extend the 30-day period upon a showing of good cause. (§ 1305, subd. (j).)

Although the hearing on the motion to exonerate may be heard after the appearance period has lapsed, the facts on which the motion is based must exist within the appearance period. (*People v. Granite State Insurance Co.* (2003) 114 Cal.App.4th 758, 768 (*Granite State Insurance*).)

Section 1306, subdivision (a) provides that if the appearance period has lapsed without the forfeiture having been set aside, the court shall enter summary judgment against the bondsman. Subdivision (c) of the section provides: "If, because of the failure of any court to promptly perform the duties enjoined upon it pursuant to this section, summary judgment is not entered within 90 days after the date upon which it may first be entered, the right to do so expires and the bail is exonerated."

Here it is undisputed that Best Choice timely filed its motion to exonerate the bond. Thereafter the trial court granted extensions of time for the hearing on the motion at Best Choice's request and by stipulation of the parties. The extensions were authorized by section 1305, subdivision (j). The hearing was finally held on February 8, 2018, at which time the trial court denied the motion. The trial court entered summary judgment five days later, on February 13, 2018.

The 90-day period for entry of summary judgment under section 1306, subdivision (c) does not begin to run until the trial court denies the motion to exonerate. (*Granite State Insurance*, *supra*, 114 Cal.App.4th at p. 770 [where surety timely files motion to exonerate and extensions of time for the hearing are granted, court's power to enter summary judgment begins on the day following denial of the motion and ends 90 days later].) The trial court had jurisdiction to enter summary judgment against Best Choice on February 13, 2018.

Best Choice's argument that the trial court lacked jurisdiction to enter summary judgment is based on the doctrine of judicial estoppel. Best Choice points to the following statement made by the County in opposition to the motion to exonerate the bond: "[T]he original 180-day appearance period ran out on January 12, 2017. On February 14, 2017, the court ordered an extension to July 6, 2017. The maximum time the law allowed in the instant matter was 180 days from the date of the hearing on the [section 1305.4] motion to extend, which would have run on August 13, 2017. (*People v. Financial Casualty* [&] *Surety, Inc.* (2016) 2 Cal.5th, 45-46.) [Best Choice's] motion to exonerate pursuant to [section 1305, subdivision (g)] was filed on July 6, 2017, and originally was set for hearing on August 4, 2017. The

court's minutes from that hearing . . . reflect the court's order to serve [the County]. Service was not accomplished until January 19, 2018, some five months later. This was also five months after the maximum time contemplated in [section 1305.4] and by the California Supreme Court . . . . [(*Ibid.*)]"

Best Choice interprets the County's argument to mean that the motion was not timely because the court lost jurisdiction on August 13, 2017. Best Choice concludes that under the County's reasoning the court's jurisdiction to enter summary judgment lapsed 90 days from that date. Best Choice asserts that the County was estopped to take a contrary position in opposition to its motion to set aside the summary judgment.

The County asserts it was not arguing in the quoted passage that Best Choice's motion was untimely. It asserts that it was only arguing that Best Choice failed to show the facts required by section 1305, subdivision (g), under which Best Choice sought relief during the appearance period.

It is difficult to tell precisely what the County meant in the quoted passage. But even assuming the County meant to argue that the trial court lost jurisdiction to grant Best Choice's motion on August 13, 2017, judicial estoppel does not apply.

Judicial estoppel applies when: "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183 (*Jackson*).) The gravamen of judicial estoppel is "'the intentional assertion of an

inconsistent position that perverts the judicial machinery.' [Citations.]" (*Ibid*.) Application of the doctrine is discretionary. (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986.)

Best Choice has raised judicial estoppel for the first time on appeal. Ordinarily we do not consider matters raised for the first time on appeal. (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3.) Best Choice counters that we may consider matters of law for the first time on appeal. (See *In re Marriage of Priem* (2013) 214 Cal.App.4th 505, 511.) It urges us to apply judicial estoppel here as a matter of law.

The argument ignores that the application of judicial estoppel is discretionary. By raising it for the first time on appeal the trial court was deprived of the opportunity to exercise its discretion. Had the trial court the opportunity to exercise its discretion, it may well have refused to estop the County. Nothing in the record shows the County was acting in bad faith or was attempting to take unfair advantage of the court or Best Choice. The County even stipulated to extend time so that Best Choice could try to produce Farmanyan in court. The County's argument that the court's jurisdiction to grant the motion to exonerate the bond ended on August 13, 2017, was legally mistaken. Mistake is not a basis for applying judicial estoppel. (*Jackson*, *supra*, 60 Cal.App.4th at p. 183.)

More importantly, that the trial court lost jurisdiction on August 13, 2017, was not the County's only basis for opposing the motion. The County established that Best Choice failed to produce evidence that it met the requirements of section 1305, subdivision (g).

Best Choice presumes that the County prevailed on the incorrect theory that the trial court lost jurisdiction to grant

the motion on August 13, 2017. But we apply a different presumption. We indulge in all intendments and presumptions in support of the trial court's order. (*Kunzler v. Karde* (1980) 109 Cal.App.3d 683, 688.) Thus we presume the trial court denied the motion on the correct ground that Best Choice failed to produce evidence it complied with section 1305, subdivision (g). In fact, the trial court did not state it was denying the motion because the motion was untimely. It said it was denying the motion because Best Choice's "efforts" were untimely.

That Best Choice failed to show it complied with section 1305, subdivision (g) is indisputable. Best Choice's own evidence shows that its agent did not detain Farmanyan until January 25, 2018, beyond the appearance period. In addition, Best Choice failed to show the prosecuting agency elected not to seek extradition. The trial court was therefore compelled to deny the motion on the ground that Best Choice failed to comply with section 1305, subdivision (g).

DISPOSITION

The judgment is affirmed. The County shall recover its costs on appeal.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Vincent J. O'Neill, Jr., Judge

Superior Court County of Ventura

---

Tahmazian Law Firm and Jilbert Tahmazian, for Defendant and Appellant.

Leroy Smith, County Counsel, Martha Jennifer Wolter, Assistant County Counsel, for Plaintiff and Respondent.